

1-1-1991

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Keith R. Fafarman  
*Indiana University School of Law*

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### Recommended Citation

Fafarman, Keith R. (1991) "State Assault Rifle Bans and the Militia Clauses of the United States Constitution," *Indiana Law Journal*:  
Vol. 67: Iss. 1, Article 9.

Available at: <http://www.repository.law.indiana.edu/ilj/vol67/iss1/9>

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# State Assault Rifle Bans and the Militia Clauses of the United States Constitution

KEITH R. FAFARMAN\*

## INTRODUCTION

On May 24, 1989, the Governor of California signed into law the Roberti-Roos Assault Weapons Control Act of 1989,<sup>1</sup> which placed severe restrictions on the private possession and use of assault rifles.<sup>2</sup> Though presently California and New Jersey<sup>3</sup> are the only states with such a statute, cities across the nation have adopted assault rifle bans.<sup>4</sup> Gun control supporters have targeted assault rifles for such legislation on the grounds that these weapons are not suitable for sporting or recreational use.<sup>5</sup> It is due to the

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\* J.D., 1991, Indiana University School of Law at Bloomington; M.S., 1978, Texas A & I University; B.S., 1972, State University of New York.

1. CAL. PENAL CODE §§ 12275-12290 (West 1991).

2. A true assault rifle is a military weapon capable of providing either semiautomatic or full automatic fire by means of a selector switch. Assault rifles today are typified by the AK-47, designed by the Soviet Union, and the M-16, designed by the United States. Common characteristics shared by most assault rifles include use of a cartridge of intermediate power, extensive use of plastics and metal stampings, and magazine capacities of 20 to 30 rounds. These rifles are usually quite compact and weigh from six to ten pounds. G. NONTÉ, JR., FIREARMS ENCYCLOPEDIA 12 (1973). An assault rifle, as popularly understood, is used in this Note to describe a semiautomatic rifle that is capable of accepting a high-capacity magazine and resembles in appearance a military weapon. See *Assault Weapons: Hearings on S. 386 and S. 747 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 101st Cong., 1st Sess. 16 (1989) [hereinafter *Testimony*] (statement of Edward D. Conroy, Deputy Associate Director of the U.S. Bureau of Alcohol, Tobacco, and Firearms); 135 CONG. REC. S3515-16 (daily ed. Apr. 7, 1989) (introduction of the Assault Weapon Import Control Act of 1989 and supporting statement by Senator Moynihan). A semiautomatic rifle requires that the trigger be released and pulled between successive shots. J. O'CONNOR, COMPLETE BOOK OF RIFLES AND SHOTGUNS 86-87 (2d ed. 1965). On the other hand, an automatic rifle will produce a rapid discharge of successive shots with a single pull and continuous pressure upon the trigger. G. NONTÉ, JR., *supra*, at 13.

3. N.J. STAT. ANN. §§ 2C:39-1 to -15, :43-6 to -7, :58-5, :58-12 to -14 (West 1982 & Supp. 1991).

4. Baer, *Guns*, U.S. NEWS & WORLD REPORT, May 8, 1989, at 20.

5. The Roberti-Roos Assault Weapons Control Act of 1989 states: "The Legislature has restricted the assault weapons . . . based upon finding . . . that its function as a legitimate sports or recreational firearm is substantially outweighed by the danger that it can be used to kill and injure human beings." CAL. PENAL CODE § 12275.5 (West 1991). See also *Testimony*, *supra* note 2, at 41 (statement of Daryl F. Gates, Los Angeles Chief of Police) ("A reasonable right to bear arms does not mandate that weapons designed and built for the express purpose of killing human beings on battle fields be made available to the general public."); Church, *The Other Arms Race*, TIME, Feb. 6, 1989, at 21 ("Some would ban the high-powered paramilitary weapons that, foes say, have only one use: to kill human beings."). But see *Testimony*, *supra* note 2, at 28-29 (statement of Edward D. Conroy, Deputy Associate Director of the U.S. Bureau of Alcohol, Tobacco, and Firearms) (Other than appearance, an AKS semiautomatic assault rifle is no different from other semiautomatic rifles.).

military nature of assault rifles that the militia clauses of the United States Constitution<sup>6</sup> may place limits on how far states may go in restricting private ownership of them.

While the first practical approach to a semiautomatic rifle was made in the 1880s,<sup>7</sup> it was not until after World War II that most of the world's major armies began to replace bolt action rifles with self-loading rifles.<sup>8</sup> The first true assault rifle that was mass-produced, the German MP43, did not enter production until 1943.<sup>9</sup> It was not until 1967 that the United States adopted a true assault rifle, the M-16, as a standard infantry rifle.<sup>10</sup> If the militia clauses do place limits on how far individual states may go under their police powers in restricting private ownership of firearms, these limits would be most applicable to assault rifles which have become the standard infantry weapons of the United States and other nations.<sup>11</sup>

### I. THE PROBLEM: THE USE OF NONFEDERAL LEGISLATION TO REDUCE THE CRIMINAL MISUSE OF ASSAULT RIFLES

The National Firearms Act of 1934<sup>12</sup> and the Gun Control Act of 1968<sup>13</sup> are the primary federal statutes regulating the private possession of automatic and semiautomatic assault rifles. In order for an individual to privately possess an assault rifle capable of automatic fire, the Secretary of the Treasury must approve the transfer and registration of the rifle to the individual, and the seller must pay a \$200 transfer tax.<sup>14</sup> An application for transfer "shall be denied if the transfer, receipt, or possession of the firearm would place the transferee in violation of law."<sup>15</sup> Under federal law, in

6. U.S. CONST. art. I, § 8, cls. 15-16.

[The Congress shall have Power . . .]

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress[.]

7. W. SMITH & J. SMITH, *THE BOOK OF RIFLES* 62 (4th ed. 1972).

8. E. EZELL, *SMALL ARMS OF THE WORLD* 16 (12th ed. 1983). The principal United States infantry rifle during World War II and the Korean War was the semiautomatic M-1 (Garand) Rifle. *Id.*

9. *Id.* at 515.

10. See W. SMITH & J. SMITH, *supra* note 7, at 489.

11. See *id.* at 68-69 (containing a nation-by-nation discussion of adopted infantry weapons).

12. National Firearms Act, ch. 757, 48 Stat. 1236 (1934) (as amended in scattered sections of 26 U.S.C.).

13. Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (1968) (as amended in scattered sections of 18 & 26 U.S.C.).

14. 26 U.S.C. §§ 5811-5812, 5845 (1988).

15. *Id.* § 5812.

order for an individual to purchase a semiautomatic rifle, the individual must certify to a firearms dealer that he is not a felon or fugitive from justice, not an unlawful user of a controlled substance, has not been legally found mentally defective, is not an illegal alien, has not been discharged from the Armed Forces under dishonorable conditions, and has not renounced his United States citizenship.<sup>16</sup> Federal law does not define the term "assault rifle."<sup>17</sup> Federal law also provides that a rifle shall not be imported into the United States unless it "is generally recognized as particularly suitable for or readily adaptable to sporting purposes."<sup>18</sup> Surplus military rifles may not be imported unless they have been classified as curios or relics.<sup>19</sup> A domestically produced semiautomatic rifle must have a barrel length of at least sixteen inches and be at least twenty-six inches in overall length or fall under the same controls as an automatic rifle.<sup>20</sup> Any further restrictions on private ownership of semiautomatic assault rifles (unless there is an expansion in the scope of federal regulations) would have to come from state or local governments.<sup>21</sup>

#### A. *Criminal Misuse of Privately Owned Assault Rifles in the United States*

Semiautomatic firearms have been used for hunting and target shooting in the United States since the early 1900s: Winchester introduced its first semiautomatic rifle to the public in 1903,<sup>22</sup> and Remington produced its first semiautomatic weapon in 1906.<sup>23</sup> It has been estimated that seventy million Americans own 140 million rifles and forty million handguns.<sup>24</sup> While in the past the vast majority of American gun owners purchased guns for hunting or target shooting, recent surveys show that nearly fifty percent of gun purchasers obtained them primarily for self-defense purposes.<sup>25</sup> Thus, weapons not designed primarily for hunting or target shooting have understandably become more common in the market and are being purchased in greater quantities by consumers. After initiating marketing of

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16. 18 U.S.C. § 922(g) (1988).

17. *Testimony*, *supra* note 2, at 28 (statement of Edward D. Conroy, Deputy Associate Director of the U.S. Bureau of Alcohol, Tobacco, and Firearms).

18. 18 U.S.C. § 925(d). *See generally* *Gun South, Inc. v. Brady*, 877 F.2d 858, 866 (11th Cir. 1989) (A changing pattern of use may affect whether a firearm is suitable for a sporting purpose.).

19. 18 U.S.C. § 925(e).

20. 26 U.S.C. §§ 5811-5812, 5845.

21. *See id.* § 927 (States are not precluded from legislating on the same subject matter unless there is a direct and positive conflict between federal and state law.).

22. W. SMITH & J. SMITH, *supra* note 7, at 68.

23. *Id.* at 68-69.

24. Baer, *supra* note 4, at 22.

25. Church, *supra* note 5, at 23-24.

the AR-15 (a semiautomatic civilian version of the selective fire M-16) in the early 1960s, Colt sold more than 300,000 of them by 1983.<sup>26</sup> Purchases of AK-47-type rifles rose from 4000 during 1986 to more than 40,000 in 1988.<sup>27</sup> The Bureau of Alcohol, Tobacco, and Firearms estimates that Americans currently own approximately one million assault rifles.<sup>28</sup> On March 21, 1989, the Secretary of the Treasury temporarily suspended permits allowing the importation of 640,000 assault rifles (at this time permit applications were also pending for an additional 136,000 rifles).<sup>29</sup> These numbers illustrate well the current American demand for assault rifles.

The Director of the Bureau of Alcohol, Tobacco, and Firearms cited four justifications for the suspension of assault rifle imports: (1) a proliferation in criminal misuse of assault rifles reported by law enforcement agencies and officials; (2) a fifty-seven percent increase in traces of assault rifles recovered from crime scenes;<sup>30</sup> (3) several highly publicized murders in which assault rifles were used; and (4) the smuggling of assault rifles out of the United States for use in foreign crime.<sup>31</sup> The Federal Bureau of Investigation (FBI) reported that of 10,540 firearm murder weapons during 1987, 772 were rifles (including, but not limited to, assault rifles); for the same year, the FBI reported 3619 sharp-object murder weapons and 1039 blunt-object murder weapons.<sup>32</sup> By contrast, the *Atlanta Journal and Constitution* determined that an assault gun is twenty times more likely than a conventional firearm to be used in a crime.<sup>33</sup> Even though statistics on criminal misuse of assault rifles are not firm and do not lead one to the conclusion that more restrictions are necessary, gun control advocates nevertheless have demanded such restrictions following mass killings, such as the January 17, 1989, incident in California where Patrick Purdy killed five children and wounded thirty others with an AK-47-type rifle.<sup>34</sup>

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26. See E. EZELL, *supra* note 8, at 844.

27. Church, *supra* note 5, at 22.

28. *Atlanta Journal and Constitution Assault Weapons Study*, reprinted in 135 CONG. REC. S7006-77 (daily ed. June 20, 1989) [hereinafter *Atlanta Study*].

29. *Gun South*, 877 F.2d at 866.

30. Upon receipt of a gun trace request from a local police department, the Bureau of Alcohol, Tobacco, and Firearms traces the gun from its manufacturer (or importer) to the licensed firearms dealer who sold it and then determines the purchaser of the firearm. See *Atlanta Study*, *supra* note 28, at S7007.

31. *Gun South*, 877 F.2d at 866.

32. 135 CONG. REC. E1930 (daily ed. May 31, 1989) (statement of Rep. Dannemeyer).

33. *Atlanta Study*, *supra* note 28, at S7006. *But see Testimony*, *supra* note 2, at 107 (statement of James J. Baker of the National Rifle Association's Institute for Legislative Action, quoting Lt. Moran, commander of the New York City police department's ballistics unit, who stated that "[a] rifle is not what usually is used by the criminals. They'll have handguns or sawed-off shotguns.").

34. See generally Church, *supra* note 5 (an article which explicitly recommends banning the sale of assault rifles to civilians in an issue shortly following the Purdy killings).

B. *Distinctions Involving Suitability of Weapons for Militia Use*

While current federal legislation does not distinguish between a "military" and a "sporting" semiautomatic rifle (except for the ambiguous "sporting purposes" importation test<sup>35</sup>) and there is no technical difference between them other than appearance,<sup>36</sup> courts have at times distinguished military from nonmilitary weapons. If such a distinction is valid, semiautomatic assault rifles must be classified as a type of military weapon since they are merely semiautomatic versions of selective fire rifles designed primarily for military use.<sup>37</sup>

In *United States v. Miller*,<sup>38</sup> the most recent case in which the Supreme Court has significantly addressed the second amendment,<sup>39</sup> the Court found that it was not within judicial notice that a sawed-off shotgun was "any part of the ordinary military equipment or that its use could contribute to the common defense."<sup>40</sup> This finding has been cited as judicial recognition of a distinction between militia and nonmilitia-type weapons.<sup>41</sup> The Seventh Circuit, in *Quilici v. Village of Morton Grove*,<sup>42</sup> stated in dicta that it did not consider privately owned handguns to be military weapons and concluded under *Miller* that handgun ownership is not protected by the second amendment.<sup>43</sup> However, just as certain weapons do not qualify as suitable

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35. See *supra* note 18 and accompanying text.

36. See *supra* note 5.

37. See E. EZELL, *supra* note 8, at 844.

38. 307 U.S. 174 (1939).

39. The second amendment states, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II.

40. *Miller*, 307 U.S. at 178 (citation omitted). In *Miller*, the defendants, who were indicted for unlawful possession of a sawed-off shotgun in violation of the National Firearms Act, challenged the Act under the second amendment. Under the Act, private possession of a sawed-off shotgun is subject to the same regulations as an automatic weapon. See *supra* notes 14-15 and accompanying text.

41. See *Quilici v. Village of Morton Grove*, 695 F.2d 261, 270 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983). See also SUBCOMM. ON THE CONSTITUTION OF SENATE COMM. ON THE JUDICIARY, 97TH CONG., 2D SESS., THE RIGHT TO KEEP AND BEAR ARMS 10-11 (Comm. Print 1982) [hereinafter RIGHT TO BEAR ARMS]. But see *Cases v. United States*, 131 F.2d 916, 922 (1st Cir. 1942) ("[T]he rule of the *Miller* case, if intended to be comprehensive and complete would seem to be already outdated . . . because of the well known fact that in the so called 'Commando Units' some sort of military use seems to have been found for almost any modern lethal weapon."), *cert. denied*, 319 U.S. 770 (1943), *reh'g denied*, 324 U.S. 889 (1945).

42. 695 F.2d 261.

43. See *id.* at 270. See also *Guida v. Dier*, 84 Misc. 2d 110, 111, 375 N.Y.S. 2d 826, 828 (N.Y. Sup. Ct. 1975) (The right to keep and bear arms guaranteed by the second amendment and by N.Y. CIV. RIGHTS LAW § 4 (McKinney 1976) does not extend to handguns and protects "only the right to be armed with weaponry suitable for use by the militia in warfare and for the general defense of the community."), *modified on other grounds*, 54 A.D.2d 86, 387 N.Y.S.2d 720 (N.Y. App. Div. 1976).

for militia use because their nonmilitary characteristics make them inappropriate for contributing to the common defense, there must also be a limit on certain military weapons that are suitable for militia use because of their extreme effectiveness (nuclear weapons, for example).<sup>44</sup> The Supreme Court in *Miller* stated that "ordinarily when called for service these [militia] men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time."<sup>45</sup> Whether the words "common use" mean in common use by the military or by civilians, semiautomatic assault rifles qualify as militia weapons.<sup>46</sup>

### C. *The Roberti-Roos Assault Weapons Control Act of 1989*

The Roberti-Roos Assault Weapons Control Act<sup>47</sup> lists fifty different rifles, pistols, and shotguns as assault weapons and provides for the future listing of other weapons that are the same or similar to those listed.<sup>48</sup> The stated purpose of this statute is to ban the listed weapons based on the legislative finding that any sporting or hunting purpose is substantially outweighed by the danger to human life these weapons present.<sup>49</sup> A listed weapon may be possessed by persons within California only if they lawfully possessed it prior to June 1, 1989 (or prior to listing of weapons subsequently declared assault weapons) and registered it by January 1, 1991,<sup>50</sup> or, alternatively, if persons obtained a permit from the state Department of Justice.<sup>51</sup> Such a permit is only issuable "upon a satisfactory showing that good cause exists for the issuance."<sup>52</sup> The statute does not define "good cause." A lawfully possessed assault weapon cannot be sold or transferred to another person unless the buyer or transferee obtains a permit for the weapon.<sup>53</sup> Thus, unless permits are readily issued, the private possession of assault weapons which are listed in the statute will be severely restricted in future years. However, since the list of designated assault weapons does not include

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44. *Cf. Cases*, 131 F.2d at 922 (stating that under the second amendment "the federal government . . . cannot prohibit the possession or use of any weapon which has any reasonable relationship to the preservation or efficiency of a well regulated militia").

45. *Miller*, 307 U.S. at 179.

46. *See supra* text accompanying notes 22-23, 37.

47. CAL. PENAL CODE §§ 12275-12290 (West 1991).

48. *Id.* §§ 12276-12276.5. Interestingly, the statute does not list either the Springfield Armory M-1A (or similar rifles made by other manufacturers), which is a semiautomatic version of the fully automatic M-14 adopted by the United States military, or the Ruger Mini-14 or Mini-30, which are compact, lightweight, semiautomatic rifles with detachable magazines chambered for the same cartridges as the M-16 and AK-47, respectively.

49. *Id.* § 11290.

50. *Id.* §§ 12280(b), 12285(a).

51. *Id.* §§ 12285(b), 12286.

52. *Id.* § 12230.

53. *See supra* note 51 and accompanying text.

all semiautomatic rifles capable of accepting high-capacity magazines, such weapons will, under the present statute, continue to be available without registration or permit requirements in California.

#### D. *New Jersey's Assault Firearms Statute*

New Jersey's assault firearms statute,<sup>54</sup> enacted on May 30, 1990, lists fifty-seven different varieties of rifles, pistols, and shotguns as assault firearms.<sup>55</sup> The statute also restricts the possession by persons in New Jersey of semiautomatic firearm magazines with a capacity greater than fifteen rounds.<sup>56</sup> An operable weapon designated as an assault firearm may only be possessed by persons in New Jersey if the state's Attorney General has determined that the particular assault firearm is suitable for use in competitive shooting matches sanctioned by the Director of Civilian Marksmanship of the United States Department of the Army and the weapon was purchased by its owner prior to May 2, 1990, and registered prior to May 30, 1991. An owner may register an assault firearm only if he is currently a member of a state-chartered rifle or pistol club.<sup>57</sup> A person may also purchase and possess an assault firearm if the superior court in the county in which he resides issues an appropriate license.<sup>58</sup> "No license shall be issued to any person who would not qualify for a permit to carry a handgun under section 2C:58-4."<sup>59</sup> This provision requires that the applicant have "justifiable need."<sup>60</sup> A justifiable need requires that the applicant "establish an urgent necessity for protection of self or others—as for example, in the case of one whose life is in danger as evidenced by serious threats or earlier attacks."<sup>61</sup> A lawfully possessed assault firearm may be transferred to a nonlicensed private individual only if it is rendered inoperable.<sup>62</sup> While New Jersey's list of assault firearms is more extensive than California's list,<sup>63</sup> it does not include all semiautomatic rifles capable of accepting high-capacity magazines.<sup>64</sup>

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54. N.J. STAT. ANN. §§ 2C:39-1 to -15, :43-6 to -7, :58-5, :58-12 to -14 (West 1982 & Supp. 1991).

55. *Id.* § 2C:39-1w. Unlike the California statute, New Jersey *does* list semiautomatic versions of the M-14 and the Ruger Mini-14 and Mini-30. *See supra* note 48.

56. *Id.* §§ 2C:39-1y, :39-3j. A person may possess such a large-capacity magazine only if he has registered an assault firearm pursuant to this statute and the magazine is used in connection with competitive shooting matches sanctioned by the Director of Civilian Marksmanship of the United States Department of the Army. *Id.* § 2C:39-3j. *See also infra* notes 89-96 and accompanying text.

57. *Id.* § 2C:58-12a-b.

58. *Id.* § 2C:58-5.

59. *Id.* § 2C:58-5b.

60. *Id.* § 2C:58-4d.

61. *In re Preis*, 118 N.J. 564, 566, 573 A.2d 148, 149 (N.J. 1990).

62. N.J. STAT. ANN. § 2C:58-13.

63. For example, the New Jersey statute designates as assault firearms *all* semiautomatic rifles with a nondetachable magazine capacity exceeding fifteen rounds. *Id.* § 2C:39-1w(4).

64. However, the possession of high-capacity magazines is itself restricted. *See supra* note 56 and accompanying text.

## II. THE MILITIA CLAUSES AND THE FEDERAL MILITIA

Since 1875, the Supreme Court has held that the second amendment is only a limit on the federal government and not on the states.<sup>65</sup> Thus, if there are constitutional limits on the power of the states to restrict or prohibit private ownership of assault rifles, they must be found somewhere other than the second amendment.

### A. Congressional Power to Provide for Arming the Militia

The United States Constitution states: "The Congress shall have Power . . . To provide for organizing, arming, and disciplining, the Militia . . ."<sup>66</sup> At the time the Constitution was drafted, the militia was generally thought to include all free and able-bodied white males who were primarily civilians and not soldiers. These men were expected to supply their own arms when called for service.<sup>67</sup> In *Houston v. Moore*,<sup>68</sup> the Supreme Court detailed the scope of congressional and state powers under the militia clauses. While the power of Congress to provide for arming the militia is unlimited and may be exercised to any extent deemed necessary by Congress, the states retain a concurrent power of legislation as long as the legislation is not inconsistent with the will of Congress.<sup>69</sup> States may pass gun control laws, but if the laws frustrate the will of Congress, the state laws are unconstitutional. The Court in *Houston* stated:

The two laws may not be in such absolute opposition to each other, as to render the one incapable of execution, without violating the injunctions of the other; and yet, the will of one legislature may be in direct collision with that of the other. This will is to be discovered as well by what the legislature has not declared, as by what they have expressed.<sup>70</sup>

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65. *United States v. Cruikshank*, 92 U.S. 542, 553 (1875). It would seem that the only plausible reason why the second amendment does not apply to states is that the militia clauses prevent states from enacting legislation that would deprive the federal government of its right to have an adequately armed militia. While the militia clauses protect the federal militia from attempts by states to "disarm" it, the second amendment performs an analogous function in protecting state militias from attempts by the federal government to disarm them. Since the federal militia's right to arms is protected within the main body of the Constitution, there is no reason for the second amendment to also provide protection.

66. U.S. CONST. art. I, § 8, cls. 1, 16.

67. See *United States v. Miller*, 307 U.S. 174, 179 (1939); RIGHT TO BEAR ARMS, *supra* note 41, at 1-5. When the Constitution was drafted, there also existed the concept of a "select militia," which would comprise individuals who were paid for their services and given special training, unlike the members of the general population that constituted the militia. The select militia concept was the predecessor of our National Guard. *Id.* at 4.

68. 18 U.S. (5 Wheat.) 1 (1820).

69. *Id.* at 16-17.

70. *Id.* at 22. Several state cases that cite to *Houston* apparently missed the Court's statement that the will of Congress can also be discovered by what it has not declared. See *Dunne v. People*, 94 Ill. 120, 129 (1879); *People ex rel. Leo v. Hill*, 126 N.Y. 497, 504, 27 N.E. 789, 790 (1891).

The view that state gun control laws may not be constitutionally enacted if they frustrate the will of Congress in providing for the arming of the militia<sup>71</sup> was recognized by the Supreme Court in *Presser v. Illinois*,<sup>72</sup> when the Court stated:

It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserved militia of the United States as well as of the [s]tates, and, in view of this prerogative of the general government, as well as of its general powers, the [s]tates cannot, even laying the constitutional provision in question [the second amendment] out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government.<sup>73</sup>

If the militia concept is still viable today, then the command of *Presser* must be heeded since a militia without suitable weapons could not effectively undertake duties assigned to it in a time of national crisis.<sup>74</sup>

In spite of more than thirty years of rapid scientific and technological development in the field of military armaments, the standard weapon of the world's infantrymen is still the rifle. Immediately following the Second World War, many military commentators argued that the foot soldier was obsolete. They expected him to be replaced by tactical nuclear weapons and automated battlefields. A succession of military encounters in Korea, Vietnam and the Middle East, not to mention insurgencies and counterinsurgencies fought around the globe in the same period, have proven the infantrymen to be the match of their colleagues who use more sophisticated arms.<sup>75</sup>

### B. *The Unorganized Militia of the United States*

The concept of a militia consisting of armed citizens functioning as a defense force for a nation extends, under English law, back to 872 A.D. Historically, these citizens were expected or required to furnish their own arms.<sup>76</sup> The term "militia" was first used during England's Spanish Armada

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71. See *Burton v. Sills*, 53 N.J. 86, 100, 248 A.2d 521, 528 (1968) (recognizing that a state gun control law may not impair the purpose of the militia clauses), *appeal dismissed*, 394 U.S. 812 (1968).

72. 116 U.S. 252 (1886). This case is still cited for the proposition that the second amendment does not apply to the states. See, e.g., *Poe v. Ullman*, 367 U.S. 497, 541 (1961); *Fresno Rifle & Pistol Club, Inc. v. Van de Kamp*, 746 F. Supp. 1415 (E.D. Cal. 1990).

73. *Id.* at 265.

74. See *Moore v. Gallup*, 267 A.D. 64, 71, 45 N.Y.S.2d 63, 69 (1943) (Hill, P.J., dissenting) (An armed citizen during times of potential danger from foreign foes or disloyal residents would be "a more useful citizen than one who, if attacked, could only throw a bootjack at his assailant."), *aff'd*, 293 N.Y. 846, 59 N.E.2d 439 (1944).

75. E. EZELL, *supra* note 8, at 16.

76. See RIGHT TO BEAR ARMS, *supra* note 41, at 1-4.

crisis to designate the entire armed citizenry.<sup>77</sup> Prior to the adoption of the United States Constitution, militia proposal debates constituted a large part of the American political scene. All of the debated proposals called for a general duty of all citizens to be armed.<sup>78</sup>

In the Uniform Militia Act of 1792,<sup>79</sup> the Second Congress established the Uniform Militia of the United States, which consisted of every free and able-bodied white male between the ages of eighteen and forty-five, other than those excepted by the statute. All members of this militia were required to provide for themselves a rifle and ammunition.<sup>80</sup>

The Uniform Militia Act of 1792 was replaced at the beginning of this century by the Militia Act of 1903.<sup>81</sup> This act divided the militia into two separate classes. The organized militia, which was "to be known as the National Guard of the State, Territory, or District of Columbia" constituted one class, with the remaining members of the militia constituting the other class designated as the Reserve Militia.<sup>82</sup> While the statute contained provisions for supplying arms to the organized militia or National Guard,<sup>83</sup> there was no provision for supplying arms to the Reserve Militia. Thus, the tradition of militiamen supplying their own arms continues today.<sup>84</sup>

Today, the militia of the United States consists generally "of all able-bodied males at least 17 years of age and . . . under 45 years of age who are . . . citizens of the United States."<sup>85</sup> The classes of the militia are the organized militia, consisting of the National Guard and Naval Militia, and the unorganized militia, consisting of militia members who are not members of the organized militia.<sup>86</sup> Thus, the power of Congress to provide for the arming of the militia under its militia clauses power extends beyond the National Guard and Naval Militia,<sup>87</sup> and state statutes which would prevent members of the unorganized militia from supplying themselves with suitable

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77. *Id.* at 2.

78. *Id.* at 4.

79. Act of May 8, 1792, ch. 33, 1 Stat. 271.

80. *Id.* § 1.

81. Act of Jan. 21, 1903, ch. 196, 32 Stat. 775.

82. *Id.* § 1.

83. *Id.* § 13.

84. *See supra* note 67 and accompanying text.

85. 10 U.S.C. § 311 (1988) (The militia also includes males who have declared an intention to become United States citizens and females who are commissioned officers of the National Guard.).

86. *Id.* Also, § 312 provides for exemptions from militia duty.

87. In the interests of organizing reserve military units which were not limited in deployment by the restrictions in federal power over the constitutional militia (which can be called forth by Congress only as provided in Article 1, section 8, clause 15 of the Constitution), Congress chose to organize the National Guard under its power to raise and support armies (article 1, section 8, clause 12) rather than its militia clauses power. NATIONAL GUARD BILL, H.R. REP. No. 141, 73d Cong., 1st Sess. 4-5 (1933).

arms would frustrate the will of Congress since an unarmed militia could not effectively function.

While neither Congress nor the Department of Defense have explicitly provided for supplying arms to the members of the unorganized militia, both bodies have provided for firearms training to the unorganized militia and the general public through the Civilian Marksmanship Program.<sup>88</sup> The Civilian Marksmanship Program, among other things, provides for a firearms sales program, construction and maintenance of shooting ranges, administration of shooting matches, and shooting skills instructions for civilians.<sup>89</sup> While the program is open to the general public, it is generally aimed toward the present and future members of the unorganized militia,<sup>90</sup> and "[t]he [Civilian Marksmanship Program] provides and encourages voluntary marksmanship training for persons who are not reached by training programs of the Armed Forces and who might be called into service in an emergency."<sup>91</sup> Citizens may currently purchase surplus M-1 rifles<sup>92</sup> through the program<sup>93</sup> and participate in the National Rifle and Pistol Matches<sup>94</sup> that are "intended to promote the national defense."<sup>95</sup> The National Matches are military and militia in nature in that all courses of fire must be undertaken using specified military weapons, with the rifle matches requiring the use of semiautomatic service weapons.<sup>96</sup>

Attempts to abolish the Civilian Marksmanship Program have failed,<sup>97</sup> and the program continues as an indication of Congress's intent to provide for the arming and disciplining (that is, firearms training) of the militia

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88. 10 U.S.C. §§ 4307-4313 (1988).

89. *Id.*

90. *See id.* § 4308(a)(2) (The Secretary of the Army shall provide for "the instruction of able-bodied citizens of the United States in marksmanship."); *see also* § 4309(b) (Rifle ranges established under this section "may be used by members of the armed forces and by all able-bodied persons capable of bearing arms.").

91. Civilian Marksmanship, 32 C.F.R. § 544.4(b) (1990).

92. *See E. EZELL, supra* note 8, at 16.

93. 10 U.S.C. § 4308(a)(5); Loan and Sale of Property, 32 C.F.R. § 621.2(e)(2) (1990). In 1961, over 77,000 rifles, 37,000 pistols, and 4300 shotguns were sold to the public through the Civilian Marksmanship Program. *Gavett v. Alexander*, 477 F. Supp. 1035, 1039 n.6 (D.D.C. 1979).

94. 10 U.S.C. § 4312(a)-(b). "The intention of all of these matches is to promote civilian marksmanship training." Civilian Marksmanship, 32 C.F.R. § 544.4(d) (1990).

95. 32 C.F.R. § 544.4(b).

96. *Id.* § 544.52. The only rifles that may be used in competition are the M-1, M-14, and M-16 (or their commercial equivalents). Competitors using the M-14 or M-16 must utilize the standard 20- or 30-round magazines during the matches. *Id.* Congress's intent that military service weapons be made available to members of the militia is also signaled by 10 U.S.C. § 4311: "The Secretary of the Army may provide for the issue of a reasonable number of standard military rifles . . . for use in conducting rifle practice at rifle ranges established under section 4309 of this title at which instructors have been detailed under section 4310 of this title."

97. *See, e.g.*, 123 CONG. REC. 23,782-23,802 (1977) (attempt by Senator Kennedy to eliminate the program from the 1978 defense budget).

under its militia clauses power. While some would doubt the effectiveness of the program in this age of modern warfare, an independent study conducted for the Department of the Army in 1966 found that the Civilian Marksmanship Program "contributes significantly to the development of rifle marksmanship proficiency and confidence in the ability to use a rifle effectively in combat on the part of those who participate in the program or benefit indirectly from it."<sup>98</sup> In a court challenge to the firearms sales portion of the Civilian Marksmanship Program, the court was not prepared to hold that the program, "enacted by the Congress in the interest of national defense and never repealed," did not further the federal government's legitimate purpose of developing a pool of trained marksmen or that marksmanship had become an obsolete or useless skill.<sup>99</sup>

While some believe that, in order to maintain public security, the United States currently relies upon a national standing army and offers no role for the armed private citizen,<sup>100</sup> the differing belief of Congress can be seen through its establishment of the unorganized militia and the Civilian Marksmanship Program. During the Second World War, when the National Guard was federalized and activated for overseas duty, the militia was a successful substitute for it. These militia members generally served without pay and provided their own arms.<sup>101</sup> The experiences of the United States in South Vietnam and the Soviet Union in Afghanistan illustrate the ability of lesser equipped and trained units, while operating in their own territory, to frustrate foreign armies equipped with the most sophisticated weaponry.<sup>102</sup>

### III. CONSTITUTIONAL LIMITATIONS ON ASSAULT RIFLE CONTROL BY STATES

Under the authority of *Houston v. Moore*<sup>103</sup> and *Presser v. Illinois*,<sup>104</sup> a state cannot totally prohibit the private ownership of firearms.<sup>105</sup> These cases also support the proposition that the type of weapons which would

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98. See A STUDY OF THE ACTIVITIES AND MISSIONS OF THE NBPRP, reprinted in 123 CONG. REC. 23,784, 23,786 (1977). See also *supra* text accompanying note 75.

99. *Gavett*, 477 F. Supp. at 1046. The *Gavett* court also stated that the Civilian Marksmanship Program was initiated "for the purpose of improving marksmanship skills among citizens in order that those called to military service might be more proficient marksmen and require less training." *Id.* at 1039. This would seem to include the militia whose composition is defined in Title 10 (Armed Forces) of the United States Code.

100. See, e.g., *Quilici v. Village of Morton Grove*, 532 F. Supp. 1169, 1181 (N.D. Ill. 1981), *aff'd*, 695 F.2d 261 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983).

101. *Dowlut & Knoop, State Constitutions and the Right to Keep and Bear Arms*, 7 OKLA. CITY U.L. REV. 177, 197 (1982).

102. See *id.* at 198.

103. 18 U.S. (5 Wheat.) 1 (1820).

104. 116 U.S. 252 (1886).

105. See *supra* notes 66-73 and accompanying text.

warrant protection are those that are "part of the ordinary military equipment" and "could contribute to the common defense."<sup>106</sup> While a state prohibition on firearms ownership might be judicially found to transcend the limits imposed by the militia clauses, courts generally have viewed favorably legislative attempts to regulate the ownership and use of firearms by civilians.<sup>107</sup> "Registration and prohibition, by their very nature, seek to achieve different goals. Regulation through registration allows possession subject to reasonable limits while prohibition mandates an outright ban on possession."<sup>108</sup>

### A. *Prohibition of Private Ownership of Assault Rifles*

In 1824, the Supreme Court held that "acts of the State Legislatures . . . [that] interfere with, or are contrary to the laws of Congress, made in pursuance of the constitution" are invalid under the supremacy clause<sup>109</sup> of the Constitution and that such state laws, "though enacted in the exercise of powers not controverted, must yield."<sup>110</sup> Under the supremacy clause a state law is unconstitutional if it "either frustrates the purpose of the national legislation or impairs the efficiency of . . . agencies of the Federal government to discharge [their] duties."<sup>111</sup> The state legislature's purpose in passing such laws is irrelevant.<sup>112</sup>

Under supremacy clause doctrine, a state prohibition on the private ownership of assault rifles would be in direct conflict with the Congress and Department of the Army and thus invalid. Congress, under its militia clauses power, has determined that it is in the interest of national defense to organize a large component of the United States population into a reserve military force.<sup>113</sup> This unorganized militia, supplying its own arms and ammunition, could be called upon to assist civil and military authorities during times of national crisis. The Department of the Army through its National Rifle Match<sup>114</sup> program has indicated its belief that a militia armed

106. *United States v. Miller*, 307 U.S. 174, 178 (1939).

107. *See United States v. Warin*, 530 F.2d 103, 107 (6th Cir. 1976) ("Even where the Second Amendment is applicable, it does not constitute an absolute barrier to the congressional regulation of firearms."); *cf. Robertson v. Baldwin*, 165 U.S. 275, 281-82 (1897) ("[T]he right of the people to keep and bear arms . . . is not infringed by laws prohibiting the carrying of concealed weapons . . .").

108. *Quilici v. Village of Morton Grove*, 695 F.2d 261, 278 (7th Cir. 1982) (Coffey, J., dissenting), *cert. denied*, 464 U.S. 863 (1983).

109. U.S. CONST. art. VI, cl. 2.

110. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824).

111. *Davis v. Elmira Sav. Bank*, 161 U.S. 275, 283 (1896). A state law may not stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

112. *Perez v. Campbell*, 402 U.S. 637, 651-52 (1971).

113. *See supra* notes 85-86 and accompanying text.

114. *See supra* note 96 and accompanying text.

with semiautomatic service weapons could best contribute to the national defense, and Congress has determined that members of the unorganized militia should supply their own arms.<sup>115</sup>

Even though Congress has indicated that it does not intend to occupy the field of gun control and that state legislation on the subject should not be preempted,<sup>116</sup> state firearms legislation cannot frustrate the purposes of national legislation. Even though the purpose behind a state assault rifle ban would likely be an attempt to reduce crime, such a statute, by impairing the efficiency of the national militia, would frustrate the intent of Congress to provide for a self-armed militia.

### B. Regulation of Private Ownership of Assault Rifles

While the second amendment places no limitations on firearms legislation by states, it is a limitation on the federal government.<sup>117</sup> However, even when applied to the federal government, the second amendment does not prevent all forms of gun control legislation.<sup>118</sup> In 1897, the Supreme Court stated, in dictum, that the second amendment was not absolute and that the right to keep and bear arms was not infringed by laws prohibiting the carrying of concealed weapons.<sup>119</sup> It was not until the National Firearms Act of 1934<sup>120</sup> that any federal restrictions on possession or use of firearms existed.<sup>121</sup> Federal gun control laws have generally been upheld on the ground that there has been no showing that the restrictions destroy or impair the efficiency of a well-regulated militia<sup>122</sup> or that they are a reasonable regulation for the maintenance of public order.<sup>123</sup>

Just as the second amendment is not a complete limit on federal firearm regulations, the militia clauses do not place complete limits on state attempts to regulate private ownership of assault rifles. State statutes that might require registration or licensing<sup>124</sup> of assault rifles would be valid because they would not prevent members of the unorganized militia from acquiring

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115. See *supra* notes 83-84 and accompanying text.

116. See *supra* note 21.

117. See *supra* note 65 and accompanying text.

118. See *supra* notes 12-20 and accompanying text.

119. *Robertson*, 165 U.S. at 281-82.

120. National Firearms Act, ch. 757, 48 Stat. 1236 (1934) (as amended in scattered sections of 26 U.S.C.).

121. *Hardy & Stompoly, Of Arms and the Law*, 51 CHL.[-]KENT L. REV. 62, 63 (1974).

122. *E.g., Miller*, 307 U.S. at 178; *United States v. Decker*, 446 F.2d 164, 167 (8th Cir. 1971).

123. *Warin*, 530 F.2d at 108. "There can be no question that an organized society which fails to regulate the importation, manufacture and transfer of the highly sophisticated lethal weapons in existence today does so at its peril." *Id.*

124. Of course, a registration or licensing system could be so onerous that it amounts to a prohibition, which would be invalid under the supremacy clause.

suitable arms. A statute that prohibited private ownership of specific weapons, but not the entire class of assault rifles, would also not impair the ability of militia members to acquire suitable arms.<sup>125</sup>

In *Cases v. United States*,<sup>126</sup> the court stated that the limits imposed on the federal government by the second amendment cannot be determined through the formulation of a general test and that a second amendment case "must be decided on its own facts and the line between what is and what is not a valid federal restriction pricked out by decided cases falling on one side or the other of the line."<sup>127</sup> Likewise, it is impractical to formulate a general test for the regulatory limits the militia clauses impose on the states. Each statute must be individually examined to determine if it prevents members of the militia from acquiring suitable arms.

### C. A Dormant Militia Clause?

Since the lack of congressional action in providing for the arming of the unorganized militia might prevent the use of the supremacy clause to invalidate state assault rifle bans, the negative implications of federal power doctrine could be used to invalidate such state legislation. While the predominant area of negative implications doctrine has been the "dormant" commerce clause,<sup>128</sup> this doctrine has only been used by the Supreme Court in cases regarding naturalization<sup>129</sup> and foreign affairs.<sup>130</sup> The Supreme Court has refused to invoke the negative implications doctrine to limit state powers with respect to taxation<sup>131</sup> and bankruptcy.<sup>132</sup>

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125. For example, the Roberti-Roos Assault Weapons Control Act takes this approach. See *supra* note 48 and accompanying text. While such a statute may not impair the militia's efficiency, the logic behind it escapes me. Individuals wanting such weapons will merely buy those that are not prohibited. The logic is similar to banning ownership of foreign sports cars because that is the kind of car most violators of speed laws drive.

126. 131 F.2d 916 (1st Cir. 1942), *cert. denied*, 319 U.S. 770 (1943), *reh'g denied*, 324 U.S. 889 (1945).

127. *Id.* at 922.

128. U.S. CONST. art. I, § 8, cl. 3.

129. See *Chirac v. Chirac*, 15 U.S. (2 Wheat.) 259, 269 (1817) (indicating that the power of naturalization under article I, section 8, clause 4 of the U.S. Constitution is exclusively in Congress).

130. *Zscherning v. Miller*, 389 U.S. 429, 440-41 (1968) (State probate laws must give way if they impair the effective exercise of foreign policy by the federal government, and even in the absence of a treaty with a foreign nation, a state's laws may affect foreign relations and thus must give way if they impair those relations.).

131. *Gibbons*, 22 U.S. (9 Wheat.) at 198-99 (1824) (The power of Congress to lay and collect taxes under article I, section 8, clause 1 of the U.S. Constitution is not exclusive.).

132. *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827) (The power of Congress to establish uniform bankruptcy laws under article I, section 8, clause 4 of the U.S. Constitution does not prevent states from enacting bankruptcy legislation except when the power has been actually exercised by Congress and the state law conflicts with that of Congress.).

A modern formulation of the dormant commerce clause standard appears in *Pike v. Bruce Church, Inc.*<sup>133</sup> and involves two levels of inquiry: (1) whether the end at which the state regulation is aimed is legitimate for the state (this implies that there is a reasonable basis for believing the regulation will promote the state's legitimate end) and (2) whether the effectiveness of the state regulation as a means to its legitimate end is sufficient to justify the burden placed upon the federal interest in interstate commerce.<sup>134</sup> This "balancing" approach considers alternative ways that a state can achieve its legitimate end.<sup>135</sup>

The strongest argument for judicial adoption of a "dormant" militia clause, with respect to assault rifles, is the requirement that citizens of all states have access to militia-type weapons in the event of a national emergency where the unorganized militia is called to service. National uniformity in the availability of militia-type weapons is required if citizens of all states are to be effective members of a self-armed militia as contemplated by Congress.<sup>136</sup> The militia clauses and congressional formation of an unorganized militia reflect a federal policy, having constitutional dimensions, for an adequately armed citizenry that is capable of fulfilling a role in this nation's defense.

Using the two-level inquiry stated in *Pike* as a dormant militia clause standard, a state assault rifle ban would satisfy the first level. A state assault rifle ban for the purpose of reducing crime within the state is a legitimate exercise of the state's police powers, and there is some basis for believing an assault rifle ban would reduce criminal homicides. It is at the second level of inquiry that uncertainty arises as to whether a state assault rifle ban would survive a dormant militia clause review. It can be argued that a state assault rifle ban would not be effective in reducing crime because a low percentage of crime is committed using assault rifles, or criminals who might use assault rifles would merely use another type of weapon, or alternative approaches such as weapon registration or owner licensing could achieve as effectively the state's desire to reduce criminal misuse of assault rifles while still allowing militia members to possess them. The principal counter argument is that the degree of burden placed upon the federal interest of national defense by a state assault rifle ban is minimal in this day of standing armies and high-tech weaponry. As the judicial balancing occurs, "in which reconciliation of the conflicting claims of state and

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133. 397 U.S. 137 (1970).

134. *Id.* at 142.

135. *Id.* ("[T]he extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.").

136. *Cf. Morgan v. Virginia*, 328 U.S. 373, 377 (1946) ("[S]tate legislation is invalid if it unduly burdens that commerce in matters where [national] uniformity is necessary—necessary in the constitutional sense of useful in accomplishing a permitted [federal] purpose.").

national power is to be attained only by some appraisal and accommodation of the competing demands of the state and national interests involved,"<sup>137</sup> choices of substantive policy would need to be made.<sup>138</sup>

#### D. Analysis of the California Statute

The fifty firearms listed as assault weapons by the Roberti-Roos Assault Weapons Control Act<sup>139</sup> include semiautomatic<sup>140</sup> versions of military assault and battle rifles,<sup>141</sup> submachine guns,<sup>142</sup> and machine pistols.<sup>143</sup> Five shotguns are also on the list. With respect to these types of weapons, the list is not inclusive. Semiautomatic rifles that are not listed for which high-capacity magazines are readily available include the Auto Ordnance Thompson (semiautomatic version of the Thompson submachine gun), Ruger Mini-14 (a lightweight rifle that fires the same cartridge as an M-16 and for which 20-, 30-, and 40-round magazines are commonly available), and the Springfield Armory M-1A (semiautomatic version of the M-14 rifle).<sup>144</sup>

Unless the California statute is amended, its noninclusiveness will allow members of the unorganized militia of the United States to continue acquiring and possessing suitable weapons to perform their duties, should the need arise.<sup>145</sup> The permit system for possession of a listed weapon<sup>146</sup> will be of importance only if being a member of the unorganized militia is "good cause" for the issuance of a permit.<sup>147</sup>

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137. *Southern Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 768-69 (1945).

138. *But cf. Morgan*, 328 U.S. at 387 (Black, J., concurring) ("I think that whether state legislation imposes an 'undue burden' on interstate commerce raises pure questions of policy, which the Constitution intended should be resolved by the Congress.").

139. See *supra* notes 47-53 and accompanying text.

140. A private individual may possess an automatic weapon in California only upon being issued a permit by the State Department of Justice. The Department of Justice may issue the permit upon a satisfactory showing that good cause exists for the issuance of the permit to the applicant. CAL. PENAL CODE § 12230 (West 1991).

141. A battle rifle is distinguished from an assault rifle by being larger, heavier, and chambered for a more powerful cartridge. An example is the M-14, which was adopted by the United States Army in 1957. See E. EZELL, *supra* note 8, at 25.

142. A submachine gun is an automatic weapon that is chambered for a pistol cartridge. Assault rifles have reduced the military role of submachine guns whose primary users today are police and security forces. *Id.* at 119.

143. A machine pistol is similar in operation and appearance to a submachine gun but is considerably smaller. See, e.g., *id.* at 126.

144. See *supra* note 48.

145. Like the United States, California also has an unorganized militia. CAL. MIL. & VET. CODE § 121 (West 1988). However, unlike Congress, which has not provided for the arming of the unorganized militia when called into the service of the United States because of the expectation that militia members would supply their own arms, California has provided for the arming of its unorganized militia in the event it is called into service by the State. *Id.* § 410.

146. See *supra* notes 51-52 and accompanying text.

147. Since the membership base of the unorganized militia is so broad, it is doubtful that falling within the class of individuals composing the unorganized militia of the United States would be accepted as "good cause."

Perhaps the greatest weakness in the California statute is its inclusion of the AR-15 (semiautomatic version of the M-16) series of rifles on the list of restricted assault weapons. The Department of the Army made the determination that this rifle is one in which a citizen's proficiency would contribute to the national defense<sup>148</sup> by allowing the AR-15 to be one of the three semiautomatic rifles that may be used in the National Matches.<sup>149</sup> The AR-15 is also particularly desirable as a militia weapon because its ammunition and magazines are interchangeable with the United States military's current service rifle. The inclusion of the AR-15 on the list of restricted weapons is in direct opposition to the will of Congress in establishing and arming of the unorganized militia of the United States.<sup>150</sup>

### *E. Analysis of the New Jersey Statute*

While the New Jersey statute<sup>151</sup> does not list all semiautomatic weapons that are suitable for militia use,<sup>152</sup> its restrictions on the possession of high-capacity magazines<sup>153</sup> limits the utility of any nonlisted weapon to serve a militiaman in the performance of his potential duties in time of national crisis. Since the listed weapons and high-capacity magazines can only be possessed by an individual who owned the particular weapon prior to May 2, 1990,<sup>154</sup> or was issued a license upon the showing of a justifiable need,<sup>155</sup> many present and future members of the federal militia who reside in New Jersey will be unable to obtain militia-type weapons. If licenses to purchase and possess suitable militia weapons are not issued to New Jersey residents upon a showing that they are members of the federal unorganized militia, the desire of Congress to have a self-armed unorganized militia will be frustrated.<sup>156</sup>

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148. See *supra* notes 94-95 and accompanying text.

149. See *supra* note 96 and accompanying text. The other rifles which may be used in the National Matches are the M-1 Garand and M-1A.

150. This direct opposition is most evident in the federal statute providing for a self-armed federal unorganized militia. See *supra* notes 79-86 and accompanying text.

151. See *supra* notes 54-64 and accompanying text.

152. For example, the New Jersey statute does not list the Auto Ordnance Thompson. However, it does list the AR-15 and M-14 (M-1A) series of semiautomatic rifles. N.J. STAT. ANN. § 2C:391w(1) (West 1982 & Supp. 1991).

153. See *supra* note 56 and accompanying text.

154. See *supra* note 57 and accompanying text.

155. Being a member of the federal militia would provide a showing of justifiable need only if the New Jersey courts determined that membership in the unorganized militia "establish[ed] an urgent necessity for protection of self or others." See *supra* text accompanying note 61.

156. Because of the greater expansiveness of the New Jersey statute when compared to California's (for example, the inclusion of the M-14 series of semiautomatic rifles, Ruger Mini-14 and Mini-30 rifles, and high-capacity magazines), the New Jersey statute more effectively prevents members of the unorganized militia from acquiring suitable weapons.

## CONCLUSION

Under its militia powers the Congress has organized the United States militia into two classes, the organized (the National Guard<sup>157</sup> and Naval Militia) and unorganized (all members of the militia who are not enrolled in the National Guard or Naval Militia). Historically, members of an unorganized militia have supplied their own arms, and Congress has not indicated any intent to change that policy.

Because Congress provides for the existence and self-arming of the unorganized militia, states are preempted from passing gun control measures that would prevent the unorganized militia from acquiring suitable arms that could be used by militia members who might be called into service. While states may continue to regulate firearms ownership under their police powers, statutes that prevent militia members from owning modern militia weapons, which are currently semiautomatic or automatic rifles with a large magazine capacity, should be invalid under the militia and supremacy clauses.

While the unorganized militia of the United States has been in existence since 1792<sup>158</sup> and many states also provide for their own unorganized militia,<sup>159</sup> its existence is little known and there are few laws concerning it. If Congress truly believes that a self-armed militia promotes the national defense, it should more explicitly provide for its arming so as to guarantee preemption of state laws which would prohibit militia members from possessing suitable arms.

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157. "The National Guard is the modern Militia reserved to the States by . . . the Constitution." *Maryland v. United States*, 381 U.S. 41, 46 (1965), *vacated*, 382 U.S. 159 (1965).

158. *See supra* notes 79-86 and accompanying text.

159. *E.g.*, *supra* note 144.

